RIGHTS STUFF

A Publication of The City of Bloomington Human Rights Commission

City of Bloomington

September 2008

Volume 110

Are Covenants Not To Lease Discriminatory?

Algy and Edna McGlothin purchased a home in a planned unit development in Kokomo in 1996. Their purchase was subject to "any and all easements, agreements and restrictions of record." One of those restrictions prohibited homeowners from leasing their homes; each home had to be occupied by an owner and immediate family members, not by tenants.

Mrs. McGlothin lived in the home until 1998, when she broke her hip and moved into a nursing home. A few months later, Mr. McGlothin also moved into a nursing home, where he died in 1999. After his death, their daughter began leasing out the home, using the rental income to help pay for Mrs. McGlothin's nursing home care.

In 2002, the Villas West II Homeowners Association notified the daughter that Mrs. McGlothin was in violation of the no-lease covenant. Mrs. McGlothin's daughter argued that rent payments were necessary to maintain Mrs. McGlothin in the nursing home. If they sold the home, Medicaid would be entitled to a good share of the proceeds, but she was entitled to keep all of the rental proceeds. The Homeowners Association was sympathetic, but also had concerns about the consequences of tenants to the neighborhood and to property values. They sued Mrs. McGlothin, who countersued with a claim that the no-lease covenant violated the Fair Housing Act. The Trial Court found that the covenant had a greater adverse effect on African Americans and racial minorities and found there was "no legitimate non-discriminatory reason" for the no-lease rule. The Association appealed to the Indiana Court of Appeals, unsuccessfully, and then to the Indiana Supreme Court, successfully.

The Indiana Supreme Court said that such covenants are "clothed with a very strong presumption of validity" and won't be struck down "absent a showing that they are wholly arbitrary in their application, in violation of public policy, or that they abrogate some fundamental constitutional right." The Court noted that the Trial Court had found that "regardless of income and age, African Americans rent their homes in greater proportion than do whites. The decrease in available rental housing caused by the no-lease covenant will predictably and disproportionately affect African Americans." The Court said that the evidence supporting the Trial Court's finding "leaves something to be desired," but accepted it on face value. Once Mrs. McGlothin made her *prima facie* case, showing that the effect of the no-lease covenant, the Association had to assert a legitimate, non-discriminatory reason for the covenant. Its reason was that "renters do not maintain homes which they rent as well as owners maintain their homes. Therefore, the exclusion of renters helps maintain property values."

Mrs. McGlothin countered by saying that other covenants help assure that the homes were kept in a "neat, clean and visually attractive environment" and thus the no-lease rule was not necessary to achieve the

(Continued on page 2)

BHRC
PO BOX 100
Bloomington IN
47402
349-3429
human.rights@
bloomington.in.gov

Migraines Caused By Work Environment Not Considered A Disability Under ADA

Cheryl Thomas worked for Avon as a customer sales representative. Later, she applied for a manufacturing position. During the interview for that job, she discussed her propensity for migraines and was sent for an evaluation to both her personal physician and to one chosen by Avon.

Both physicians agreed that she should wear a respirator at all times in the manufacturing department. Thomas, however, felt that the respirator would not be a reasonable accommodation. Because the break rooms were in the manufacturing department, she would be exposed to the perfume odors if she removed the respirator even in the break rooms. Thomas ultimately decided not to transfer.

Eventually, Thomas applied to work in Avon's lipstick department. She was able to work in that department without any migraines. Avon, however, uses a system called "cross-training," in which employees are required to work in other areas of manufacturing. During her cross-training in the perfume department, Thomas experienced migraines that left her incapacitated. Her personal physician decided that she should never again work in the perfume department.

Avon refused to allow her to return to work after that. They sent her to the company's physician, who would not recommend that she return to work. The company's physician subsequently issued an opinion stating that Thomas was unable to tolerate exposure to fragrances. Given the nature of Avon's business, an accommodation was "virtually impossible and beyond the standard of 'reasonable' that is required by the ADA."

Thomas sued, claiming she had a disability that substantially limited her ability to work, one of the major life activities listed by the EEOC in its regulations. The District Court found, however, that Thomas was "not significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." She therefore did not meet the requirements set out by the Supreme Court as necessary to show she was a qualified person with a disability.

The case is Cheryl Thomas v. Avon Products, Inc., 2007 WL 1796011 (S.D. Ohio). ♦

Covenants Not To Lease

(Continued from page 1)

Association's goal. But the Indiana Supreme Court said that "maintaining property values involves not merely maintaining property but also improving and updating it. Under these [other] covenants, owners are obligated only to maintain the home, not to improve or update it. Owners who occupy their property have an incentive to improve and update because they can both enjoy the improvements and reap the fruits of their labor upon selling their home." There is no comparable incentive to improve a rental home. Mrs. McGlothin did not provide evidence of any "equally effective, less discriminatory alternatives to the defendant's legitimate non-discriminatory policy" and thus the Association's policy "does not support a disparate impact FHA (Fair Housing Act) violation, even if it has a disparate impact on a protected class."

Nor was there much evidence to find that the policy was intended to be discriminatory, which would give Mrs. McGlothin a disparate treatment claim. The developer had used the word "restricted" in its ad, a term that some might see as synonymous with "segregated." But two African American homeowners in the neighborhood said they did not interpret the term that way. The Association itself never used the word "restricted" in its description of the neighborhood. The Court remanded the case for additional adjudication on this issue.

The case is Villas West II of Willowridge Homeowners Association, Inc. v. McGlothin, 885 NE 2d 1274 (Ind. 2008). ♦

Supreme Court Issues Two Decisions On Retaliation

On May 27, 2008, the United States Supreme Court issued two decisions on retaliation. To explain these two cases fully would take more space than this newsletter provides, and would bore most readers to tears. Suffice it to say that in both cases, a majority of the justices found that employees could sue for retaliation even when the statutes they were suing under did not explicitly provide for retaliation lawsuits.

In the first case, Gomez-Perez v. Potter, 2008 WL 2167189 (U.S. 2008), Ms. Gomez-Perez worked for the post office. She requested and was granted a transfer to be nearer to her ill mother. She then requested a transfer back to her old job, but by that time, her job had been converted to part-time and given to another, younger employee. She filed an age discrimination complaint. After that, she said, she was harassed in various ways: she was called into meetings at which groundless complaints were leveled at her; her name was written on anti-sexual harassment posters; she was falsely accused of sexual harassment; she was told to "go back" to where she belonged and her hours were drastically reduced. She sued under the federal sector provision of the Age Discrimination in Employment Act, alleging she had been retaliated against for filing the age discrimination complaint. That provision of the law does not include a specific protection against retaliation. But a majority of the Court essentially said that such a protection is implied, saying that "retaliation for complaining about age discrimination is 'discrimination based on age.'"

In the second case, CBOCS West, Inc. v. Humphries, 2008 WL 2167860 (U.S. 2008), Mr. Humphries worked for Cracker Barrel as an assistant manager. Cracker Barrel is owned by CBOCS West; Mr. Humphries is an African American man. Mr. Humphries said he was fired because of his race and because he had complained to managers that another manager had fired an employee on the basis of race. He sued under Title VII, the federal civil rights law, and under an older law called Section 1981, which prohibits discrimination on the basis of race in forming contracts. His Title VII lawsuit was dismissed because he failed to pay some filing fees, but he continued with his Section 1981 case. CBOCS West argued that since Section 1981 had no explicit protection against retaliation, Mr. Humphries' retaliation complaint had to be dismissed. Again, a majority of the Court disagreed.

If you have questions about your rights and responsibilities under various civil rights laws, please contact the Bloomington Human Rights Commission. ♦

Nursing Mothers In The Workplace

A new Indiana law went into effect on July 1, 2008 that, while not strictly a civil rights issue, may affect employers and employees.

The law, SEA 219, says that employers with 25 or more employees shall, "to the extent reasonably possible . . . provide a private location, other than a toilet stall, where an employee can express the employee's breast milk in privacy during any period away from the employee's assigned duties." The law also says that, again "to the extent reasonably possible," employers must provide cold storage space for keeping the expressed milk or allow the employee to provide her own portable cold storage device for keeping the milk until the end of the work day.

The law says that employers are not liable for any harm caused by the expression or storage of the milk "except in cases of willful misconduct, gross negligence or bad faith."

The Indiana Perinatal Network has some suggestions on its website to help employers comply with the new law. It says the private space for expressing the breast milk can be a storeroom or an office with a "Please Do Not Disturb" sign on the doorknob. Private spaces may be created with a wall divider or a curtain. If possible, employers should provide an electrical outlet as well, as electric pumps are more efficient than manual ones.

The Network notes that both employers and employees benefit from extended breastfeeding. Breastfed babies are less likely to get sick, and when they do get sick, they recover more quickly. Hence, their mothers miss fewer days of work, and their mothers' employers pay less for medical costs. Employers that provide lactation support also experience less turnover, according to studies. ♦

BHRC Issues Annual Hate Incidents Report

The BHRC has released its current hate incidents report, which indicates 29 reported incidents from July 2007 through June 2008. The report is available for the public upon request and online at www.bloomington.in.gov/bloomington-human-rights-commission.

Barbara McKinney, director, emphasized that the number collected each year is reflective only of those incidents that were reported, which may not clearly illustrate an accurate count. "The report is the best gauge of hate incidents we have but it is never possible to determine a completely accurate number," said McKinney. "We use the report to get a sense of what is happening in the community with respect to these types of activities."

As is always the case, the hate incidents described in this report take a variety of forms. While 29 are covered in the report, much of the reported activity falls into more than one category, including verbal harassment, actual threats, physical violence and vandalism. McKinney reiterated that while incidents often seem to vary in degree of severity, in each case the victim was concerned enough to reach out for help.

The report also addressed motivations behind each report, ranging from race and national origin bias to anti-religious or anti-gay and lesbian sentiment.

The BHRC receives information for its report from a variety of sources, including the City of Bloomington Police Department, news reports and individuals. People who are victims of hate incidents are urged to report them to the police by calling 911 or to the BHRC by calling 349-3429 or e-mailing human.rights@bloomington.in.gov. The BHRC accepts anonymous reports.

City of Bloomington
Human Rights Commission
PO Box 100
Bloomington IN 47402